U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 June 2006

Case No.: 2005-LHC-91

OWCP No.: 07-157117

IN THE MATTER OF

JESSIE FLEMING,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC./
AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

BRIAN C. BECKWITH, ESQ.,
On Behalf of the Claimant

FRANK J. TOWERS, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act)[1] brought by Jessie Fleming (Claimant) against Northrop Grumman Ship Systems, Inc./Avondale Industries, Inc. (Employer).

[1] 33 U.S.C. § 901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 7 Feb 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[2]

Witness Testimony of

Claimant
Michael Nebe

Exhibits

Employer's exhibits (EX) 1-15[3]

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

STIPULATIONS[4]

1. Claimant was involved in an accident on 27 Jun 00 in the course and scope of his employment.

2. There is jurisdiction under the Act.

3. There was an employee-employer relationship between Employer and Claimant at the time of the accident.

4. Proper and timely notice was given by Claimant.

5. There was proper and timely controversion.

6. At the time of the accident, Claimant's average weekly wage was $231.62 and his compensation rate was $225.32.

[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[3] EX-6 is a 915 page en globo copy of medical records. Counsel were advised and cautioned that although EX-6 would be attached to the file, only those pages specifically cited by counsel in their examination of witnesses or in their briefs would be considered and become part of the record upon which I would base my decision. EX-12 and EX-15 are previous depositions of the Claimant, who testified at the hearing. I similarly advised and cautioned counsel that although EX-12 and EX-15 would be attached to the file, only those pages specifically cited by counsel in their examination of witnesses or in their briefs would be considered and become part of the record upon which I would base my decision.

[4] Tr. 5

ISSUES

1. Nature and extent of injury

2. Suitable alternative employment

3. Supervening injury

4. Reasonableness and necessity of future medical care

FACTUAL BACKGROUND

The basic facts of this case are not in dispute. On 27 Jun 00, Claimant injured his back on a ship while working for Employer as a painter. He underwent two back surgeries and has never been able to return to his original job. He was initially paid temporary total disability benefits, until May 2003. At that time, based on a doctor's finding that Claimant reached maximum medical improvement (MMI) and could perform light work, Employer reduced those payments to partial benefits. In October 2003, Claimant fell through the floor at a motel and sustained further injuries.

POSITIONS OF THE PARTIES

Claimant argues that Employer has not been able to show suitable alternative employment (SAE) and he is entitled to total disability. Claimant also seeks authorization for medical care, specifically, back surgery. Employer responds that it has demonstrated SAE and that Claimant is entitled only to partial disability. Employer also argues that the October 2003 fall was a supervening cause that relieves it of liability. It argues that the back surgery sought by Claimant is not reasonable or necessary.

LAW

Nature and Extent of Disability

Once the court determines that a claimant suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[5] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial).

[5] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[6] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[7] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

The question of extent of disability is an economic as well as a medical concept.[8] To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[9]

Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof shifts to employer to establish suitable alternative employment.[10] Addressing the issue of job availability, the Fifth Circuit developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[11]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[12] The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish that the claimant is physically and mentally capable of performing the work and that it is

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[6] 33 U.S.C. § 902(10).
[7] *Sproull*, 25 BRBS at 110.
[8] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[9] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[10] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[11] *Id*. at 1042.
[12] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

realistically available.[13] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[14] A showing of only one job opportunity may suffice under appropriate circumstances.[15] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[16] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[17]

The Employer may have to demonstrate the availability of a job in the locality where the claimant was injured or, if he changed residences after the injury, in the new location, depending on the reasons for and circumstances surrounding the relocation.[18]

Supervening Injury

Although the humanitarian nature of the Act minimizes the causation analysis in the event of an intervening injury, the Act requires some connection between employment and disability.[19]

The Fifth Circuit has applied two different standards to the degree of intervention required to break the causation link to the employment. The first requires that the intervening event overpower and nullify the initial injury.[20] The second standard only requires that the intervening event worsened the original injury.[21] The Circuit has recognized the inconsistency in those standards, but has not yet resolved it.[22]

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[13] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[14] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); s*ee generally, Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[15] *P & M Crane Co.*, 930 F.2d at 430.
[16] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[17] *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[18] *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001).
[19] *Hartford Acc. & Indemnity Co. v. Cardillo*, 112 F.2d 11 (1940).
[20] *Voris v. Texas Emp. Ins. Ass'n* , 190 F.2d 929 (5th Cir. 1951).
[21] *Mississippi Coast Marine v. Bosarge,* 637 F.2d 994 (5th Cir.1981).
[22] *Shell Offshore, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 122 F.3d 312 (5th Cir. 1997); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir.1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898 (5th Cir. 1981).

Reasonable and Necessary Medical Care

Employers are only responsible under the Act to provide reasonable and necessary medical care that is appropriate for the injury.[23] Once a claimant presents evidence that a qualified physician found treatment was necessary for a work-related condition, the claimant has established a prima facie case for compensable medical treatment. The burden then shifts to the employer to show the treatment is not reasonable, necessary, or related to the employment.[24]

EVIDENCE

***Claimant testified at trial in pertinent part that*:[25]**

> He was born in 1961 and now lives about one hour north of Jackson, Mississippi. He has lived there for two years. He would like to be treated by physicians in Mississippi because it is hard on his back to return to New Orleans. He does not intend to stay in Mississippi and plans to head back to New Orleans, which he considers his home.
>
> He did testify under oath, at his 23 Feb 05 deposition that he lived at 512 Washington Avenue in New Orleans and had lived there for six years. He has been living with his aunt in New Orleans from 1995 or 1996, until 2002. In 2005 he lived in Mississippi.
>
> He presently lives in West Mississippi, but does not intend to move back to the New Orleans area.[26] He just had his $89 check transferred so he can go back home.
>
> Before working for Employer, he worked as a tractor trailer operator, tractor trailer repairman, construction worker, assembly line worker, grill cook, and landscaper.
>
> He earned his GED in 1984 or 1985. He went to Highland Community College for about two and one-half years. He took accounting, oil and diesel repair, and phonics. He completed a training program as a tractor trailer operator.

[23] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979); 20 C.F.R. § 702.402.
[24] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984).
[25] Tr. 18-62.
[26] Claimant's testimony as to his place of residence appeared to be internally inconsistent.

In 1996, before he worked for Employer, Claimant was shot in the head. His tongue is kind of crooked and he cannot talk very well. He has a speech impediment and cannot hear in his right ear. His eyes also water. If he breathes too heavy or smells too much perfume or air freshener, he gets a bad cough. He has glaucoma in his left eye with blurry vision. He has to wear dark glasses because of the glaucoma. He has facial scarring on the left side of his face, from the gunshot wound. He swallowed the bullet.

About 20 years ago, Claimant had some criminal problems and served time in Orleans Parish for possession of crack cocaine and marijuana and in Illinois for possession of a controlled substance. In the last ten years, he has had a couple of felony convictions. Around 2003 or 2004, he was convicted of possession of crack cocaine. He was also arrested for possession of marijuana in December 2003 and placed on three years probation. He is still under probation for those charges.

He started working for Employer as a Class 4 painter in April 1999 at $8.22 an hour. In about an eight-month period, he was promoted to second class based on his performance. He earned $11.39 per hour as a Class 2 painter.

On 27 Jun 00, he went to work on the ship, MENDONCA. As he was climbing down a ladder, he lost his footing and fell to the bottom of the ship. By 11:30 that morning, he was standing up and felt a sharp pain. It took him about one hour and 15 minutes to climb out of that tank. He went to his supervisor and reported the fall. He was sent to First Aid, where Dr. Mabey gave him Tylenol and tried to send him back to work. Claimant, however, clocked out immediately and went looking for a doctor on the outside.

He found an orthopedist, Dr. Katz, in the phone book and started seeing him. He first saw Dr. Katz on 7 Jul 00. Dr. Katz did not take x-rays, but sent Claimant to rehabilitation for exercise and gave Claimant five epidural shots. The shots did not help and neither did the work program. At that point, Dr. Katz performed surgery on Claimant.

Claimant's first back surgery was on 31 Oct 00. By 21 Feb 01, Claimant was able to work for Employer sitting at a table making paint swabs. Sitting at the table aggravated his back problems. Claimant was still under Dr. Katz's treatment and experiencing pain. It was a throbbing, aching pain that something like Aspirin could not get rid of. It affected his ability to move.

Dr. Katz took Claimant off work in September 2002. Claimant had a second surgery on 3 Dec 02 and continued treating with Dr. Katz through May 2003. Claimant was discharged from Dr. Katz after a verbal disagreement about an appointment. He did not leave a threatening voice mail message for Dr. Katz filled with profanity or swear words. Dr. Katz told Claimant he needed continued medical treatment, so Claimant tried to see Dr. Russo.

At first, Employer would not authorize Dr. Russo. Eventually it did, but on his first scheduled appointment in September 2003, Dr. Russo did not have any of Claimant's records and had to reschedule.

In the meantime, on 31 Oct 03, Claimant returned from Mississippi for an appointment and was staying in a motel. The bathroom floor was weak and rotten and he had to step over wires to use the bathroom. He forgot that the floor was weak and when he stepped the whole floor gave way. He fell against the tub. He dislocated his shoulder. He also had neck pain, along with pain down his back.

He went to Advanced Medical Center on Behrman Highway in Gretna. He treated there for close to one year. He received electric therapy, medicine, and shots in his shoulder and back. He has been discharged from care for the injuries he received in the motel.

He had back pain before the incident in the motel, but experienced an increase in his pain afterwards. He brought a claim based on those injuries, but does not know the status of it.

He also saw Dr. Russo after the fall in the motel. He told Dr. Russo about the fall. Dr. Russo told Claimant not to go back to work. Dr. Russo never discharged Claimant because Dr. Russo gave up his practice. The day he saw Dr. Russo, Employer cut his benefits down to $89.10 every two weeks.

Claimant saw Dr. Bartholomew, an orthopedist, one time. Since Dr. Bartholomew did not have any of Claimant's records, he could not give him a prescription for pain medicine. Claimant was aggravated that he was in pain and Dr. Bartholomew could not help him. He was not angry at Dr. Bartholomew. Dr. Bartholomew did not discharge Claimant from his care after that one visit because he found Claimant to be uncooperative with his recommendations.

He also saw Dr. Steck, at the request of Employer, for a second opinion. He told Dr. Steck about the motel fall.

Claimant is in pain. It is like something punching his back, a throbbing pain that he gets when sitting down. He can stand up, but experiences pain on his left side. He cannot squat far or stoop and can bend just so far. He can hold his hands over his head for a couple of minutes. He needs a cane to ambulate and Drs. Katz, Courtney, and Steck recommended he use one. He is not getting treatment for his back because Employer will not authorize it. He does see a pain management doctor from Dr. Steck's office.

Dr. Steck and Dr. Courtney said Claimant cannot return to work. Claimant does not want to work in pain.

Dr. Russo, Dr. Steck, and Dr. Katz told Claimant he has a broken screw in his back; however, they have not recommended any surgery yet to remove it. They think that the fuse is solid, so even with the broken screw; it will not cause any problems. Claimant believes they have that opinion because it is not their backs with broken screws in it.

He has not worked since he left the modified position at Avondale in 2003.
He did not look for work in 2004.

In 2005 he applied for various jobs in New Orleans and Mississippi. He went to Harrah's, McDonald's, and Burger King. He applied for a janitorial job with a temporary service. He applied at a store across the river as a supervisor. He applied at Ace Hardware to be a stock person or a cleanup person.

He looked for work at McDonald's on the Westbank Expressway in New Orleans. He went to Evans Cooperage [phonetic] in New Orleans. He went to a grocery store on the corner of Washington and they asked him if he ever had surgery. They told him that they would call him. They said he was a high risk because he might fall down or re-injure himself. He does not have any copies of the job applications.

He would love to be able to work. The last job application he filled out was three months ago at Tyson's in Mississippi. He does not have a copy of that application and they were not hiring. He went to the Unemployment Office for that period and filled out an application to be a "cutter." He thought he could try to do it.

He has never worked as a customer service representative, receptionist, or in a lady's beauty salon. In 1989, he worked as a security guard in Metairie. He does not think he could work as a security guard today because of pain and his inability to stay up and walk around, sit down, and carry a weapon. He has had a vocational skills assessment.

He does not think he could physically do the jobs he applied for, but would try because he has been living on the streets and under bridges. He has to support himself and will try anything to live.

Claimant testified via deposition on 23 Feb 05 in pertinent part that:[27]

His address is 301 Huey P. Long Avenue, Gretna Louisiana, but he lives at 512 Washington Avenue, New Orleans, Louisiana and has lived there for about six years.[28]

Claimant testified via deposition, in a civil suit, on 20 Apr 05 in pertinent part that:[29]

He lives on the streets and does not have a home, but has had a mailing address with his aunt at 512 Washington for about six years.

He is in more pain now than he was before the motel fall. The level of pain is different, constant, and has never gone back to the level it was before the fall. It has gone from a five to a nine or ten.

In a discovery response in a civil suit, Claimant stated in pertinent part that:[30]

The motel fall exacerbated his preexisting low back injury.

***Michael Nebe testified at trial in pertinent part that*:**[31]

He has been a vocational rehabilitation counselor for approximately 15 years and a licensed rehabilitation counselor for the State of Louisiana since 1993. He has testified before Administrative Law Judges in similar proceedings and his opinions have never been dismissed or rejected. He is employed by FARA Health Care and has been for approximately two weeks. He has worked for them before.

As part of his duties with FARA, he interviews workers' compensation claimants. He generally meets with them personally. He did not personally meet with Claimant.

He generated a report in June 2002 concerning Claimant.[32] He was asked to look at all of Claimant's medical records and personnel records from Employer, as well as any other information that was in the file. He was then asked to do a vocational evaluation and provide recommendations as to Claimant's potential for returning

[27] EX-12.
[28] The Court notes this testimony and recognizes the inconsistencies in where Claimant has lived.
[29] EX-15.
[30] EX-14, p. 18.
[31] Tr. 63-109.
[32] EX-5, p. 9.

to work. He did not do a labor market survey, but did do a transferable skill analysis and identified jobs that Claimant would qualify for, had he looked for work. He still stands by the opinions stated in his report of June 2002.

He has reviewed a November 2003 report generated by Mr. Gary Ordes.[33] The report comports with the standards of Louisiana vocational rehabilitation counseling. It includes all the information that would generally be asked in regards to a vocational evaluation. It covers all the areas -- medical, physical, work history -- and uses general resources such as the Dictionary of Occupational Titles and other resources to determine what Claimant's vocational potential would be. It also has some labor market survey work that identifies jobs at different times. The report indicates there were some jobs available on or about 2 May 03.

The first job indicated is a fundraiser. He does not know who the employer would have been. He does not know the specific physical requirements. The job was identified through the Louisiana Job Service. The Louisiana Job Service is a job service set up by the State of Louisiana. It works with numerous employers throughout the area who send in information about available jobs. The Department of Labor categorizes and screens jobs and then puts out a list of jobs for people to look through and apply for.

The three jobs that are on page 3 of the November 2003 report were available as of 2 May 03 and appear to be appropriate based on all the information provided, as well as Claimant's restrictions and educational background. They are jobs that Claimant could have applied for at that time.

The report lists other jobs that were available 3 Nov 03 through 8 Nov 03, including a telemarketer, Wal-Mart greeter, and receptionist with the Job Service. Those jobs were appropriate based on Claimant's vocational profile. Based on Claimant's medical background, work history, and educational background, he could have applied for those jobs and had a reasonable expectation of obtaining them.

The average rate of pay for the first set of jobs is $5.50 an hour to $10 an hour. The average rate of pay for the second set was $5.15 to $7.50.

Mr. Ordes generated another report in June 2005.[34] It lists four jobs as available from 13 Jun 05 through 18 Jun 05. The report comports with the basic requirements of Louisiana vocational rehabilitation counseling. The jobs listed are the types of jobs that Claimant could have applied for and with a reasonable expectation of obtaining, based upon his educational background, work history, and medical condition. Dr. Steck approved of the June 2005 report's jobs.

[33] EX-5, p. 4.
[34] EX-5.

He also did a labor market survey for 3 Feb 06 and 6 Feb 06. He contacted some employers and identified three appropriate jobs for Claimant. The first was a first-line supervisor with Central Parking Systems, in New Orleans. They need someone to supervise their employees, handle customer service situations, and make schedules. The position does not require any experience. They said right now they are really desperate and will consider anybody that applies. The pay starts at $10.50 an hour, full time. The receptionist who answered the phone indicated the job involved alternate sitting, standing, and walking. Mr. Nebe did not discuss the impact of an applicant's criminal background with the employer.

The second job is a door-checker position at Sam's Wholesale Club on Airline Highway, between 24 and 32 hours per week at $6.00 to $8.00 an hour. That job would require that Claimant stand at the front door and check IDs or receipts. The job requires standing, but the employer said a stool could be used during lulls. If customer volume demanded, the greeter would have to stand for as long as necessary. They were accepting applications as of the day before the hearing.

The third job identified is with the Audubon Zoo. As of 1 Mar 06, it will hire various positions such as ticket-taker and cashier. The pay will be $6.00 per hour and is available part-time and full-time. He spoke to a person at the main office in personnel. Whether the job is performed sitting or standing depends. For concessions, it is standing, but stools and chairs are provided. The ticket-taker generally stands. The employer said if necessary, something could be considered.

All three of those jobs are commensurate with Claimant's work history, educational background, and medical doctor's opinions. He could apply for these jobs and have a reasonable expectation of obtaining them.

In 2002, he did not know that Claimant had been shot in the head and had a hearing loss. Those are things he would want to know. He did not conduct intelligence or any other tests on Claimant nor did he recommend that someone else do it.

He was not aware of Claimant's criminal record when he did the initial assessment. However, some of the criminal record developed after the initial assessment while the other happened beyond ten years, which is not allowed in the record. Therefore, it would not be relevant. He cannot particularly speak for a police department as to whether they would hire him as a police radio dispatcher with a felony background.

It is appropriate in the vocational rehabilitation environment to determine the exact physical requirements of a particular position before determining whether it is suitable alternative employment for a particular applicant. The police radio dispatcher listing does not include a specific employer or detailed physical requirements. Likewise, there are no exact physical requirements listed for the central station operator job, the November 2003 telemarketer position, the receptionist, or the Wal-Mart greeter. He assumes Mr. Ordes obtained those and considered them, but they are not listed in the reports.

Sedentary work includes occasionally lifting from one to ten pounds and walking/standing as needed.

The parking lot cashier position identified in the June 2005 report is appropriate and reasonable for Claimant. It is up to the employer to decide if they wanted to hire him with his criminal background. The beauty salon receptionist position would not have been Mr. Nebe's first choice for Claimant, but he believes Claimant is qualified for it. It is hard to determine whether Claimant would have had a reasonable chance of getting that job.

Mr. Nebe heard Claimant speak in the hearing and feels that he has some impediment. However, he could understand Claimant and thinks Claimant could have attempted the customer service position with the sportswear company.

He believes that Claimant could reasonably have an expectation of successfully competing for a job as a receptionist in a veterinary clinic, given his two and one-half years of college in accounting.

None of the reports identify a contact person for Claimant to call about available job. Mr. Nebe did not make any appointments for Claimant or offer to accompany Claimant to any interviews. Mr. Ordes tried to meet with Claimant, but was not able to do so.

The jobs in Mr. Ordes' reports are within Claimant's restrictions and vocational profile, so Mr. Ordes must have believed in his mind that they were appropriate. Jobs as a dispatcher, operator or telemarketer, are generally rated sedentary, or if not sedentary, they are considered sedentary to light. They should all be appropriate for Claimant according to the Dictionary of Occupational Titles. For example, a receptionist is almost always sedentary; it is a person sitting at a desk. If they get up to stand, it is very infrequent.

The absence of IQ testing, WRAT exam or eyesight test does not interfere with the vocational rehabilitation efforts undertaken in this case. Claimant has his GED, as well as some post-high school education. If he could perform two and one-half years in an accounting program in college, he can read, write and perform general functions of most entry level jobs. That does not account for any gunshot related brain damage in the interim.

Dr. Courtney Russo testified via deposition in pertinent part that:[35]

He has been board-certified as an orthopedic surgeon since 1972. He first saw Claimant on 28 Aug 03. It was not clear who sent Claimant to his office and Claimant had no records. He sent Claimant home and told him to come back with whatever records he could assemble.

Claimant returned on 24 Nov 03 and provided a history describing his work injury and surgeries with Dr. Katz. Dr. Russo took x-rays which revealed Dr. Katz's previous fusion. The x-rays also showed a broken screw. Dr. Russo did not note and does not recall Claimant mentioning a slip and fall in a hotel sustained on 29 Oct 03. Dr. Russo's plan for Claimant was to keep him off of work until they found out what was going on, and give him pain medication.

Claimant's next visit was on 2 Feb 04. Claimant complained of back pain. Dr. Russo ordered a CAT scan, but it was not approved by the insurance company. The last visit was 10 Jun 04. He told Claimant that he could not tell if the broken screw was a source of pain and suggested Claimant return to Dr. Katz or another neurosurgeon to see if the screw should be removed.

Dr. Russo would defer to Dr. Katz's opinion as to whether Claimant's broken screw should be removed.

Dr. John Steck testified via deposition in pertinent part that:[36]

He has been board-certified in the field of neurosurgery since the summer of 2002. He first examined Claimant on 9 Dec 04. Dr. Steck had some incomplete medical records. He elicited a history from Claimant, who mentioned he was cared for by Dr. Katz. Claimant said he had fusion surgery in October 2000, but did not improve after the operation. He also reported a second operation in December 2002, which was probably an extension of the fusion. Claimant said that operation did not help either and he continued to have pain.

[35] EX-7.
[36] EX-8.

Claimant never mentioned that he was involved in a slip-and-fall accident at a motel in October 2003. Individuals who have had lower back pathologies and lumbar fusions are more susceptible to aggravation of those pathologies. A fall could exacerbate a lumbar spine injury.

He took x-rays of Claimant's lumbar spine. They revealed a previous spinal surgery with instrumentation, screws, and pedicles at L4-5 and S1. One of the S1 screws was fractured. There was interbody bone in both levels, but he was not able to determine whether Claimant had a solid arthrodesis. He told Claimant he was going to arrange for an MRI and CT scan of the lumbar spine. Once he reviewed both of those studies, he would call Claimant to make a recommendation.

At that time, Dr. Steck did not make any recommendations or formulate any opinions about Claimant's ability to return to some form of work. However, if Claimant's previous treating surgeon, after seeing him over multiple occasions, felt that Claimant was capable of sedentary work, Dr. Steck would have agreed with that.

Claimant returned on 3 Feb 04 with an MRI and CT scan of his lumbar spine. The MRI showed an L4-5 spondylolisthesis with pedicle screws at L4-5 and S1. There was evidence of a fracture of one of the S1 screws at the pedicle vertebral junction, which is common. He offered Claimant a referral to pain management and discharged him. He did not see Claimant again.

He does not believe Claimant would benefit from further spinal surgery or that his condition will change significantly in the next year. There is no reason for the screw to cause pain. It is basically a piece of metal in a solid piece of bone and not in a position to cause pain. There is no motion across the bone. There are no nerves innervating any region of that bone. The screw had not moved at all from where it was previously placed.

Claimant's x-rays show that he has a solid arthrodesis at L5-S1. That means that the S1 pedicle screw fracture is irrelevant. The fracture could have happened at any time and there is no way to relate it to any specific accident. More than likely, it is not related to trauma. An injury where Claimant slipped and fell through the floor is not likely to cause an otherwise solid fusion to become unstable.

Pedicle screws are not intended to last forever. Their role is to stabilize the spine until successful arthrodesis occurs. Claimant had a successful arthrodesis at L5-S1, which makes the fractured screw irrelevant. No treatment is indicated for this fractured screw.

He reviewed the jobs and descriptions listed in the "Vocational Labor Market Survey Report" dated 17 Jun 05. He believes that these jobs were appropriate for Claimant from a neurosurgical perspective.

Claimant does not require further surgery and more than likely should be treated with anti-inflammatory medications. Claimant may also need other medication to help relieve him of the chronic low back pain. He found Claimant to be a cooperative patient.

Dr. Ralph Katz testified via deposition in pertinent part that:[37]

He has been a board-certified orthopedic surgeon since 1998. Claimant first presented to him on 29 Mar 00 with complaints of back pain. Claimant was referred to him by Employer. He treated Claimant from 29 Mar 00 to 2 May 03. He performed two surgeries on Claimant.

The first surgery was on 31 Oct 00. Claimant underwent a decompressive lumbar laminectomy, as well as an instrumented lumbar fusion. Claimant had bone removed from his back, a bone graft, and pedicle screws placed in order to stabilize that segment. Four pedicle screws were used for that first surgery.

The second surgery was a revision on 3 Dec 02. A revision is done when the patient fails to heal or fails to go into union or arthrodesis of the bony segments and has problems associated with that. The surgeon goes in and basically does the procedure again or revises it. 2 May 03 was the last time he saw Claimant. At that time, Claimant appeared to have a solid fusion at both the 4-5 and the 5-1 levels, where the surgery was performed.

On 2 May 03, Claimant came in stating he had called a couple of days ago and left messages on the nurse's answering service. His messages were quite unbelievable. There were expletives, profanity, and idle threats. He stated that he wanted his medicine. He complained of pain in his lower back. Dr. Katz examined Claimant. He walked on his own, but had subjective complaints of pain. Otherwise, he was grossly neurovascularly intact. X-rays, at that time, showed he had a solid fusion.

He discharged Claimant that day because of his overall behavior and his language to everyone. He told Claimant that he needed to find another physician to take care of him.

There were times when Claimant was cooperative, while other times he was just erratic. He did what he wanted and was very volatile. He would come to the clinic and be nice one day, but the next day he would come in screaming at the nurse, complaining, yelling, and making demands and idle threats. He had done

[37] EX-9.

that in the past, but this was the last time. Dr. Katz thought that Claimant's complaints of pain were legitimate. The discharge had nothing do with whether Claimant required any further medical treatment. Claimant did not need any further surgery or treatment from Dr. Katz, so he told him to find another physician. Claimant was actually doing pretty well the last couple of times Dr. Katz saw him, except for his social issues.

Clinically, Claimant had reached a solid fusion and maximum medical improvement with regard to his lower back. He was having some mechanical pain in his lower back. Dr. Katz felt that Claimant could go on without further treatment from him. At that time, Dr, Katz did not issue an opinion as to whether Claimant could return to some form of work, but based on the previous functional capacity evaluations (FCE), Dr. Katz felt that in May 2003 Claimant was capable of doing sedentary and possibly light work. Dr Katz had explained in detail to Claimant prior to his surgeries that Claimant was not going to be able to return to his usual type of hard, physical work after this type of surgery.

If there had been a breakage or a fracture with regard to the pedicle screws in May 2003 he would have noted it. Fractured pedicle screws can cause pain if the patient has a nonunion and does not have a solid arthrodesis. Whether the screw needs to be removed depends on several factors, including whether the patient has pain in light of a pseudoarthrosis. Just having some pain with a solid arthrodesis is not a reason to take out a screw. Surgery would not be needed to correct a fractured screw with a solid arthrodesis. A traumatic event, such as a slip and fall, could cause a screw to fracture.

A plain x-ray is the best method for imaging a solid arthrodesis and determining whether surgery would be needed to correct the fractured screw. It is possible for a screw to back out if there is a solid arthrodesis, depending on where the screw fractured. If there is some separation, there can be motion of one of those screws either in or out. However, it is not probable that pain comes with that micro motion if there is a solid arthrodesis because the bone does not move. The screw is moving, but the bone is not moving.

There may be pain from the screw moving into the soft tissue, depending on how far it moved. If it is backed out and pushing up against the skin, there will be pain. If it is just several millimeters, there should not be pain. It would have to be something more than just showing on up on an x-ray or MRI. It would have to be detected by clinical examination, feeling the screw poking out or coming through the skin. That would be an indication to remove the screw.

If there is instability and a broken screw, surgery is indicated, unless the patient is ill or has medical problems. If the screw is poking through or tenting the skin and causing pain Dr. Katz would try to remove or at least cut the screw down. In all other situations, if there is a solid fusion and a broken screw he would do nothing.

He reviewed Claimant's lumbar spine MRIs performed on 14 Jan 05. There was no evidence of any movement on these films and the screw appears to be near its original position with very little movement posteriorly. Therefore, there is no significant amount of displacement posteriorly into the soft tissues. The fusion is solid with no movement. He would not recommend surgery for this fractured screw and believes that Claimant can in all probability do sedentary work and perhaps even light work if a FCE indicates as such.

Dr. Richard Tucker testified via deposition in pertinent part that:[38]

He has been a board-certified chiropractor for ten years. He first saw Claimant on 22 Nov 03 by referral from his attorney. Claimant gave a history describing a fall in a motel room on 29 Oct 03. He also related his gunshot wound, two previous surgeries, and said that he had been on "no work" status with Employer since September 2002. Dr. Tucker conducted an examination and discovered what he believed to be spasms that were probably related to the motel fall. Dr. Tucker believes that the motel fall aggravated Claimant's back. He recommended ice and nerve blocks. He also referred him for pain management.

On 1 Dec 03, Dr. Tucker took x-rays and found a possible left shoulder separation and possible broken screw. He recommended an orthopedic consult to decide whether the screw should be removed and would definitely defer to an orthopedist's opinion on that.

The last time his clinic treated Claimant was on 26 Oct 04. Dr. Tucker's final assessment was lumbar radiculitis, aggravation of post surgical lumbar fusion, thoracolumbar sprain/strain, left arm and shoulder contusion, left shoulder sprain/strain, acromioclavicular joint sprain/strain, and muscle contraction headaches; all secondary to his motel fall. Dr. Tucker deferred to orthopedic specialists for an assessment of Claimant's ability to return to work, based on the need to address the broken screw.

[38] EX-10.

Dr. Bradley Bartholomew testified via deposition in pertinent part that:[39]

> He has been board-certified in neurological surgery for about three years. The first and only time he examined Claimant was on 14 Sep 04. At that time, all he had was a copy of an x-ray report taken during surgery on 30 Oct 00. He had no medical records from Dr. Katz and no diagnostics after October 2003. Claimant presented with complaints of constant low back pain. Claimant also provided his medical history. Claimant did not mention a slip-and-fall accident in October 2003. Dr. Bartholomew did not specifically ask Claimant if he had any injuries after the surgery and Claimant did not volunteer the information. Dr. Bartholomew performed a physical examination of Claimant.
>
> Dr. Bartholomew advised Claimant that he planned to get his records and in the meantime prescribed Vicodin, a narcotic for pain, and a non-addictive muscle relaxant. Claimant was unhappy because he was already on a higher strength Vicodin and Soma, a different muscle relaxant. When Dr. Bartholomew tried to explain to Claimant that because he did not have any records or imaging studies, he was not willing to give him two very addictive medications, Claimant was unhappy and hostile. Claimant may have been very frustrated to start with because Dr. Bartholomew did not have his imaging studies.
>
> He discharged Claimant from his care the same day because Claimant was very angry and got up and walked out when told he was not going to get those medications. Dr. Bartholomew has not seen Claimant since.
>
> Dr. Bartholomew does not know what surgery was done in December 2002. Depending on the type of surgery and the type of bone involved, Claimant "may not have had time to go on to a complete fusion" by October 2003. If the fusion was done in 2000 and the non-fusion procedure was done in 2002, he would expect that the fusion matured in three years. If Claimant had pseudoarthrosis from nonunion, depending completely upon the screw to hold everything rigid, then certainly a fall could cause the screw to break and cause an increase in his symptoms.
>
> Generally, he would not take out a screw just to take it out. However, if there is a nonunion, then the fusion has to be redone. So in the process of redoing the fusion, he would remove a broken screw. Some doctors would take the screw out if the fusion is solid, but he would not. The only time that he would take the screw out is if he needed to redo the fusion, assuming the screw is not stuck to the rod and moving or migrating somewhere in the muscle or close to the spinal canal, in which case he would take it out.

[39] EX-11.

If the patient has plain x-rays or a CAT scan showing a solid fusion, then he would not remove the screw, unless it becomes disconnected from the rod or is moving over the spinal canal. In this case, if plain x-rays show solid fusion before and after the October 2003 accident, he would most likely not recommend extracting the screw.

A vocational assessment by Michael Nebe on 19 Jun 02 reported that:[40]

Dr. Katz limited Claimant to sedentary to light duty employment, including no lifting in excess of 15 pounds, no excessive sitting, sitting/standing at will, no bending while lifting, no stooping, and no work on ladders. Based on these restrictions and Claimant's educational background and work history, Claimant had a number of career alternatives, including jewelry painter, glass waxer, resin coder, stainer, touch up painter, spray gun stripper, boot and shoe brusher, and panel edge painter. Mr. Nebe considered the following jobs appropriated for Claimant: high rise desk guard, gate guard, hardware/lumber store checker, ticket-taker, and shopping mall customer service representative. Mr. Nebe found that Claimant could participate in Employer's return to work program, in light of the FCE that showed Claimant capable of sedentary to light in spite of submaximal effort.

A vocational assessment and labor market survey by Gary Ordes on 3 Nov 03 reported that:[41]

He conducted a survey based on Dr. Katz restricting Claimant to sedentary work and a FCE indicating that even though Claimant did not give maximum effort, he could return to sedentary employment that allowed frequent position changes and the use of a cane. He was not able to personally meet with Claimant.

Mr. Ordes identified the following jobs as available on or about 2 May 03:

1) Fundraiser doing telephone solicitations at $10 per hour.
2) Police radio dispatcher at $1,012 per month.
3) Central station operator monitoring systems, taking calls, and coordinating actions at $7.50 per hour.

Mr. Ordes identified the following jobs as available 3 – 8 Nov 03:

1) Parking Lot Cashier at $6.50 per hour.
2) Wal-Mart Greeter standing or sitting on a stool at $5.15 per hour.
3) Receptionist answering the phone, making appointments and doing office work at $7-7.50 per hour.

[40] EX-5, pp. 9-11.
[41] EX-5, pp. 4-8.

A vocational assessment and labor market survey by Gary Ordes on 5 Aug 05 reported that:[42]

> He completed an updated survey based on Dr. Katz's restated restriction of Claimant to sedentary work. He was not able to personally meet with Claimant.
>
> Mr. Ordes identified the following jobs as available on or about 13-18 Jun 05:
>
> 1) Parking Lot Cashier at $6.50 per hour.
> 2) Beauty Salon Receptionist at $6.00 per hour.
> 2) Sportswear Customer Service Representative including telemarketing at $6.50 per hour.
> 3) Veterinary Receptionist answering phones and taking messages at $6.00 per hour.

Employer's records indicate that:[43]

> Claimant was hired in April 1999. Following his injury on 27 Jun 00 he "cleared payroll," but worked limited part-time hours for Employer at the same hourly rate (with one 40 hour week) until February 2001. He was rehired in a modified position on 21 Feb 02 and began working substantially full-time at a higher hourly rate.

DOL forms indicate that:[44]

> Employer paid Claimant temporary total compensation benefits from 29 Jun 00 to 27 Jun 01 and temporary partial benefits from 21 Aug 02 to 4 Sep 02 and 14 Oct 02 to 27 Oct 02. Employer stopped paying benefits on 27 Jun 01 because Claimant returned to work. Employer stopped paying benefits on 21 Jun 02 because of "Remaining TTD." Employer modified benefits on 20 Aug 02 because of a settlement in which Claimant received $4,000 and his attorney received $800.[45]

Claimant's responses to interrogatories indicate that:[46]

> He resides in New Orleans.

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[42] EX-5, pp. 1-3.
[43] EX-2, pp. 8, 37-40; EX-3; EX-4.
[44] EX-1, pp. 8-15.
[45] The settlement was issued by this court on 16 Aug 02 and discharged all of Employer's liability for compensation benefits from 27 Jun 00 through 8 Jul 02. It left future compensation benefits and medical benefits open.
[46] EX-13.

ANALYSIS

Suitable Alternative Employment

None of the medical evidence suggests and Employer does not argue that Claimant has ever been able to return to his original job. Moreover, the previous settlement resolved all compensation issues between the injury and 8 Jul 02. The weight of the medical opinion evidence shows that Claimant had reached MMI and was physically capable of performing sedentary jobs at least as of May 2003. Claimant's testimony was inconsistent on that point, as it was on many others, but he at one point said he could try to do a job at a chicken plant.

Consequently, the central question is whether Employer carried its burden to establish sedentary SAE for Claimant. In that regard, I note that in this case an essential finding is based on my observation of the Claimant as a witness. Claimant has a speech impediment. Mr. Nebe testified that although he heard Claimant speak at the hearing and agrees that Claimant has an impediment, he believes Claimant could do the customer service job. I found Claimant to be very difficult to understand in person and do not believe he could be successful in any job which involves any significant amount of detailed oral communication or use of the telephone.

I did not find the substance of Claimant's testimony to be particularly credible because of internal inconsistencies[47] and statements of fact clearly contradicted by other evidence.[48] However, I attributed those misstatements to his confusion and his lack of a clear ability to recall, rather than a desire to deceive the Court. Accordingly, I found his speech difficulties to be genuine. As a result, any SAE cannot require sophisticated oral communication skills or telephone use.[49]

Although Claimant raised the issue of geography and suggested that no jobs in New Orleans would qualify as SAE, I find otherwise. The inconsistencies of Claimant's various sworn deposition and hearing testimony, along with his response to interrogatories lead me to conclude that more likely than not, Claimant has a fluid lifestyle without a specific residence, but is probably more likely at any given time to be in New Orleans as anywhere else and could, with no significant disruption, take a job in New Orleans. Consequently, I find that New Orleans is an appropriate location for SAE for Claimant.

[47] Claimant testified inconsistently, particularly as to his residence.
[48] Claimant contradicts himself through his insistence that he informed his doctors of his motel fall and that he did not make any threatening or profane statements.
[49] In fairness to the vocational experts, their inability to meet with Claimant meant that they could not appreciate his speech impediment and adjust their surveys accordingly.

None of the jobs identified by Mr. Ordes as available in May 2003 qualify because they all required use of a telephone. The same is true for the receptionist position identified as available in November 2003, the receptionist and customer service positions identified as available in 2005, and the supervisory position identified as available in 2006. I do find that the parking lot cashier, greeter, door checker, and zoo positions qualify as sedentary SAE in the appropriate locality. Thus, the evidence establishes that it is more likely than not that as of 3 Nov 03, Claimant had a post-injury earning capacity of $6.50 per hour.

Claimant also raised the question of whether a criminal record would be a disqualifying factor. In the absence of any other evidence, the testimony of the vocational expert, with the knowledge of Claimant's criminal background, that the jobs were nonetheless reasonable makes it more likely than not that they are. Similarly, I find that the job hunting efforts Claimant described in his unreliable testimony are insufficient to establish a diligent search.

Supervening Event

The evidence clearly establishes that the motel fall aggravated Claimant's preexisting condition that resulted from his work injury. Claimant testified to as much in his deposition in the civil suit. What the evidence does not clearly establish is the degree to which his condition was aggravated by the motel fall and whether the motel fall was so significant that Claimant would have the same degree of disability today had he sustained only the motel fall and not the original work injury.

I find that the evidence indicates that the motel fall more likely than not worsened Claimant's condition, but that it did not overpower and nullify his original injury. That presents the issue of the conflicting standards. The first interpretation terminates an employer's liability if there is an intervening act that aggravates or worsens a claimant's condition by any amount. On the other hand, the alternative interpretation leaves the employer liable if an intervening event aggravates the condition significantly, but falls short of totally superseding the original injury. Of the two standards, the latter is more consistent with the humanitarian nature of the Act.

Accordingly, I find that the motel fall does not relieve Employer of liability.

Medical Care – Back Surgery

Claimant's counsel does not address this issue on brief. With almost no exception, the clear weight of the expert medical opinion in this case is that Claimant's requested surgery to remove the broken screw is neither necessary nor reasonable.

ORDER AND DECISION

1. Claimant is entitled to and Employer shall pay temporary total disability benefits from 9 Jul 02 through 2 Nov 03.

2. Claimant is entitled to and Employer shall pay permanent partial disability benefits from 3 Nov 03 to present and continuing.

3. Claimant's average weekly wage at the time of his work-related injury was $231.62.

4. Claimant had a weekly post-injury wage earning capacity of $260.00 as of 3 Nov 03, which shall be adjusted to the commensurate rate for the date of injury for the purposes of computing benefits owed.[50]

5. Employer shall pay all reasonable, appropriate and necessary medical expenses in accordance with Section 7 arising from Claimant's 27 Jun 00. The requested surgery to remove a broken screw is not reasonable, appropriate or necessary.

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[51]

11. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

[50] Such adjustment will be made by discounting the November 2003 SAE wage to June 2000 rates, by applying the same percentage as the change in National AWW for the same period. *Richardson v. Gen. Dynamics,* 19 BRBS 48 (1986).

[51] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267 (1984).

13. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[52] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

[52] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **28 Sep 04**, the date this matter was referred from the District Director.